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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 3154

ROBERT D. HAYES,

Petitioner,

vs.

UNITED STATES OF AMERICA and ALAN D. CORNUE, Special Agent, Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional Provision Involved 3
Statutes Involved 3
Explanation of References to the Record 5
Statement of the Case 6
Reasons for Granting the Writ 7
Conclusion 23

Appendix A

Opinion of the United States Court of Appeals for the Seventh Circuit 25

Appendix B—The Judgments Below

1. Original Judgment 34
2. Judgment on the Petition for Rehearing 35
3. Orders of the District Court 36

Appendix C—Constitutional and Statutory provisions involved 38

TABLE OF AUTHORITIES CITED

Cases

Abel v. United States, 362 U.S. 217 (1960) 16
Douglas v. Union Carbide, 311 F. 2d 182 (4th Cir., 1962) 19
Hickman v. Taylor, 329 U.S. 495 (1947) 17

Hovey v. Elliott, 167 U.S. 409 (1897) 21
Independent Productions Corp. v. Lowe's Inc., 283 F. 2d 730 (2nd Cir., 1960) 22
Reisman v. Caplin 375 U.S. 440 (1964) 16
Ungar v. Sarafite 376 U.S. 589 (1964) 16
United States v. Powell, 379 U.S. 48, (1964) 8, 16, 20
United States v. Proctor & Gamble Co., 356 U.S. 667 (1958) 17

OTHER AUTHORITIES

Amendment V of the United States Constitution 3
Rule 7(b)(1), Federal Rules of Civil Procedure, 28 U.S.C.A. 3, 19
Rule 26(a) and (b), Federal Rules of Civil Procedure,, 28 U.S.C.A. 3
Rule 37(b)(2)(iii), Federal Rules of Civil Procedure 28 U.S.C.A. 4, 20

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Robert D. Hayes, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The orders of the United States District Court enforcing an Internal Revenue summons served on petitioner and striking petitioner's affirmative defenses were entered on March 21, 1968, and appear in Appendix B to this petition.

The opinion of the United States Court of Appeals upholding the enforcement of the Internal Revenue summons is reported at 408 F. 2d 932 and is presented in its entirety in Appendix A to this Petition. An order denying a Petition for a rehearing was entered on April 7, 1969, and appears in Appendix B to this Petition.

JURISDICTION

The orders of the United States District Court for the Northern District of Illinois were entered on March 21, 1968. The judgment of the Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court, was entered on February 19, 1969. The order denying Hayes' Petition for a rehearing in the Court of Appeals was entered April 7, 1969. The jurisdiction of this Court is invoked under the provision of 28 U.S. Code, Sec. 1254 (1).

QUESTIONS PRESENTED

Petitioner, a trustee of American Building Constitutionally (hereinafter referred to as A.B.C.), a not for profit trust was ordered by the United States District Court to comply with an Internal Revenue summons requiring him to produce certain books and records of A.B.C. The questions presented are:

1. Was Petitioner denied due process of law by refusal of the trial court to allow him to discover whether the issuance of the Internal Revenue summons was arbitrary and unreasonable, in bad faith or for the purpose of harassment?

2. Are United States District Courts required to follow the Federal Rules of Civil Procedure in Internal Revenue summons enforcement proceedings?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law";

STATUTES INVOLVED

Rule 7(b)(1) of the Federal Rules of Civil Procedure, 28 U.S. Code:

> (b) *Motions and Other Papers*
>
> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Rule 26 (a) and (b) of the Federal Rules of Civil Procedure, 28 U.S. Code:

> "(a) *When Depositions may be taken.* Any party may take the testimony of any person, including a party, by deposition upon oral examination or writ-

ten interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. As amended Dec. 27, 1946, effective March 19, 1948."

"(b) *Scope of Examination.* Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. As amended Dec. 27, 1946, eff. March 19, 1948."

Rule 37 (b) (2) of the Federal Rules of Civil Procedure, 28, U.S. Code:

"(b) *Failure to Comply with Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or any officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or any order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the follows:

* * *

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;"

EXPLANATION OF REFERENCES TO THE RECORD

Reference to the Exhibits in support of Petitioner's affirmative defenses and the deposition of Special Agent Cornue and Hayes are to the appendix prepared for use by appellant Hayes in the United States Court of Appeals for the Seventh Circuit and are designated (App. 7th ——).

A copy of said appendix has been filed in the Court with this Petition.

STATEMENT OF THE CASE

On February 1, 1968, a petition was filed in the United States District Court for the Northern District of Illinois on behalf of the United States of America and Alan D. Cornue, Special Agent, Internal Revenue Service, to enforce Internal Revenue summonses issued to determine whether A.B.C. was a taxable entity and, if so, the extent of its tax liabilities. Robert D. Hayes, Richard J. Stephenson and J. Alton Lauren, as trustees of ABC, were respondents below but only Hayes appealed the order of the United States District Court.

On February 2, 1968, the District Court entered a rule to show cause why the trustees should not be compelled to obey the Internal Revenue summons. An appearance was filed on Hayes' behalf on February 23, 1968. On February 27, 1968, trustees Stephenson and Lauren, filed their joint motion to accelerate the hearing which was granted and set for March 15.

Hayes filed his answer to the petition and affirmative defenses on March 4, 1968. On March 8th Hayes filed a notice to take the deposition of Special Agent Cornue on March 12th and requested documents relevant to Hayes' defense. Cornue's deposition was reset by agreement to March 14th, the date set to depose Hayes. Both depositions were taken on March 14, 1968.

At the hearing on March 15, 1968, the Government moved to strike Hayes' affirmative defenses and as grounds therefore cited petitioner's refusal to answer questions at the deposition. The court reserved ruling on that motion.

At the hearing, in order to enable them to prepare a defense to the revenue enforcement proceeding, Hayes'

counsel requested time for additional discovery because of certain facts developed in Cornue's deposition, requested leave to file a motion for production, and requested the court to determine whether Agent Cornue was justified in refusing to answer certain questions at his deposition. However, the court denied all of petitioner's requests.

The hearing proceeded and concluded on March 15, 1968, and the trial court held for the Government. Findings of fact and conclusion of law were filed on March 21, 1968. Orders were entered on March 21st directing compliance with the Internal Revenue summons and striking Hayes' affirmative defenses. (App. B).

The Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court resting its decision concerning the striking of the affirmative defenses on the ground that Hayes was not prevented from presenting evidence to support them. Regarding denial of further discovery, the Court of Appeals held that Hayes never made a "formal" motion to answer particular questions or for a continuance. A petition for a rehearing was denied on April 7, 1969, Circuit Judge Kerner dissenting (App. B).

REASONS FOR GRANTING THE WRIT

Petitioner submits that the two questions posed by this appeal (1) whether Hayes was denied due process of law by being precluded from discovering whether the issuance of the Internal Revenue summons was arbitrary and unreasonable, in bad faith or for the purpose of harassment, and (2) whether United States District Courts must follow the Federal Rules of Civil Procedure in Internal Revenue summons enforcement proceedings are manifestly substantial and call for resolution by this Court.

1. The decision of the Seventh Circuit Court of Appeals is inconsistent with the decision of this Court in *United States* v. *Powell,* 379 U.S. 48 (1964).

In *United States* v. *Powell,* 379 U.S. 48, 58 (1964), this Court decided that in a revenue enforcement proceeding:

> "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

One of Hayes' affirmative defense alleged that the Government had embarked on a course of action calculated to harass and embarrass him, A.B.C. and its members.

In an effort to support the allegation of harassment and bad faith, Hayes submitted four exhibits. Exhibit 2 (App. 7th 35-72) consisted of the testimony of Henry M. Fowler, Secretary of the Treasury, before the House of Representatives, Subcommittee on Foundations—Their Impact on Small Business—Of the Select Committee on Small Business, on November 15, 1967. Secretary Fowler was accompanied by Sheldon Cohen, Commissioner of Internal Revenue and Stanley S. Surrey, Assistant Secretary of the Treasury for Tax Policy. The Chairman of the Subcommittee was the Honorable Wright Patman. The hearings were concerned with tax exempt foundations.

Congressman Patman opened the hearing by excoriating the Internal Revenue Service and the Treasury Department for their inactivity with regard to the exempt foundations saying:

> "The United States Treasury has distinguished itself by indifference, indolence and bungling in facing up to the problems of tax dodging via foundations. For five years, we have been trying to discover whether the Treasury is alive or dead when it comes to supervising and scrutinizing the affairs of this nation's tax exempt foundations." (App. 7th 39).

Representative Patman suggested that a special governmental agency be established to oversee tax exempt foundations, cited the "success of the A.B.C. scheme" (App. 7th 39) as proof that "supervision is desperately needed" (App. 7th 39) and said:

> "In my view, the Treasury, itself, has hatched the A.B.C. tax-dodging scheme. Since 1921, Treasury regulations have required the filing of some type of application for tax exemption. And, since 1941, the Department's regulations have required foundations to file an annual information return. Yet, 46 years later, the exemption application is still required only by regulation and not by law. * * * *So, now the Treasury is faced with the A.B.C. problem at the same time that it is trying to sell the Congress on a bigger tax bite.*" (Emphasis supplied) (App. 7th 40)

Congress Patman then said:

> "Coming now to the particulars of our investigation of the organization known as American Building Constitutionally, I think it has become quite evident that the promoters of ABC have flagrantly defied the Treasury as well as this Committee. Their defiance, of course, is built on the assurance that the Treasury Department is sluggish, if not dead, and that their manipulation of Treasury regulations will probably not result in any crackdown by the Secretary's men. Indeed, we would not now be plagued by the ABC and by the threat of similar organizations springing up, if the Treasury had been on its toes instead of on its back." (App. 7th 40).

"I should like to say only one thing with respect to A.B.C. at this time: that is if the operations of the foundation—members of A.B.C. are legal, the Secretary must so inform the members of Congress so that they can transmit the tax-avoidance scheme to their constituents." (App. 7th 41)

Secretary Fowler, in defending the Treasury Department, assured Chairman Patman that Treasury was cracking down on A.B.C., and said:

"With regard to the A.B.C. matter which you made reference to on the mass foundation formation, I shall only call your attention to the news release of the Treasury of October 12, in which—and I quote:

"The Internal Revenue Service said today that for the past eight months it has been looking into widely promoted plans for tax avoidance through the use of private foundations or family trusts and is examining a number of foundations created under these plans.

"The IRS statement was made in *response* to inquiries resulting from Representative Wright Patman's announcement that the House Subcommittee on Foundations which he chairs will conduct hearings on "Tax-Dodging Foundations" starting on October 30.

"IRS expressed doubts about the legality of this type of foundation, and warned that the tax consequences to those who participate could be adverse. While it cannot discuss individual cases, IRS said the schemes for escaping tax follow a general pattern and usually involve creation of one or more private foundations. The taxpayer turns over to the foundation his business assets and all or a substantial part of his other assets and becomes a director-trustee of the foundation. The promoters of the plan usually represent that a taxpayer can operate his business under cover of a foundation as an "educational" or "research" activity exempt from the Federal income tax."

"That is the end of the IRS release. I know that

> Commissioner Cohen, who is much more familiar than I would be, for reasons that I have just previously stated, is fully familiar with the operations of the IRS in this area, and in his statement tomorrow before the Committee, I believe he will deal with the so-called ABC or mass foundation matter." (Emphasis supplied). (App. 7th 51-52).

Petitioner asks this Court to note that Secretary Fowler said that the Internal Revenue statement was "in response" to inquiries of the "Wright Patman Committee." Congressional committee investigators surely begin their duties months before the hearings are held—and contact governmental agencies such as IRS in their investigations. In his deposition, Special Agent Cornue, testified that he wasn't assigned to investigate Hayes as a trustee of ABC until September 29, 1967, (App. 7th 180), just one month prior to the beginning of the Patman hearings (App. 7th 51).

Exhibit 3 (App. 7th 73-136) consisted of the testimony of Sheldon Cohen, Commissioner of Internal Revenue before the "Wright Patman Committee." Commissioner Cohen was accompanied by Stanley S. Surrey, who also testified. Mr. Cohen testified that in each District Office there are Internal Revenue agents whose specialty is tax exempt organizations (App. 7th 93), that a bulletin went out to all District Offices to "watch out" for the ABC "kind of [an] organization" (App. 7th 94), that Internal Revenue was developing a list of foundations for their own use and for distribution to the various State Attorneys General to aid them in 'policing this operation" (App. 86) and that there was excellent cooperation from state authorities in Illinois and California (App. 7th 86).

Congressman Patman, commenting on ABC to Commissioner Cohen, stated:

> "Now, suppose this results in it [ABC] being just a big fraud and these people are being robbed or being defrauded of their money, are you going to make recommendations to the local district attorneys and to the Department of Justice?" (App. 7th 117).

Mr. Cohen replied:

> "The Attorney General, for example, in California, has already begun some investigation, independent investigation in *which we are cooperating.* We would welcome the cooperation of the other local authorities. Yes, sir. We would certainly hope that the appropriate authorities would go into this scheme with us." (Emphasis supplied). (App. 7th 117-118).

It is interesting to note here that on June 11, 1969, Hayes was convicted of conspiracy and grand theft in a prosecution brought by the California Attorney General arising out of activities concerning ABC.

Congressman Patman stated that by letter of September 6, 1967, his Committee asked the IRS for the names of the ABC members, that Internal Revenue replied on October 23, 1967, that "it had not yet been successful" in identifying the members (App. 7th 118). Commissioner Cohen was then asked when the Committee would receive the names, and replied that the IRS had many names and that it would make them available to the Committee on a confidential basis (App. 7th 118). The following colloquy then occurred:

> "Mr. Patman: Mr. Cohen, will you please tell this Committee exactly what you are doing with respect to the organization known as American Building Constitutionally?
>
> "You have already explained pretty well what you have done on that.

"You expect to pursue it, I am sure, and do everything that is possible to unravel it."

"Mr. Cohen: There are both revenue agents and special agents assigned to that investigation.

"Mr. Patman: I imagine you have your very special agents on that." (App. 7th 119).

The Revenue summons issued by Agent Cornue is dated October 5, 1967, just twenty-nine days after Wright Patman's Committee requested information regarding ABC.

It was with the foregoing in mind that Mr. Hayes asserted his affirmative defense of improper purpose pursuant to the *Powell* case, *supra*. Discovery on that defense might well have affirmed his not unfounded convictions and suspicions concerning the propriety of the issuance of the Internal Revenue summons. Perhaps the records were not sought to determine the tax liability of ABC and Internal Revenue was being pressured for information regarding ABC by the Patman Committee. Perhaps, the books and records of ABC were only sought by IRS for the names of its members or in cooperation with California authorities which would not have been legitimate purposes. The testimony reveals that Internal Revenue was simply out to get Hayes or ABC for anything and by any means. Congressman Patman's exhortation of the Commissioner to "do everything that is possible" as to ABC (App. 7th 119) substantiates the questionable propriety of seeking ABC's books and records and clearly indicates harassment. Granting Hayes' motion for leave to take further discovery would have allowed petitioner to determine the actual purpose of the issuance of the revenue summons and would have enabled him to properly prepare a defense.

Agent Cornue's deposition also demonstrated the obstructionist attitude and unfairness of the Government in attempting to preclude Hayes from discovering all of the facts and circumstances surrounding the issuance of the revenue summons. The following matters were revealed:

1) Cornue was told by his supervisor the matters about which he would be permitted to testify (App. 7th 235, 239);

2) Government counsel said there were certain areas that Agent Cornue would not be permitted to testify, "short of a court order" (App. 7th 238);

3) Cornue refused to answer questions regarding the location or existence of documents related to his affidavit which supported the petition in this matter (App. 7th 244-246);

4) Cornue was assigned to the Hayes as Trustee investigation prior to any revenue agents (App. 7th 259) and that neither of the two revenue agents later assigned are with the specially trained group of revenue agents that deal with tax exempt organizations (App. 7th 260);

5) Cornue had not consulted with anyone from the specially trained group since the beginning of the ABC investigation (App. 7th 260);

6) Cornue consulted with the specially trained group as to his investigation of Hayes individually, but refused to reveal any of the conversations (App. 7th 261-262);

7) Cornue refused to state whether the investigation of respondent Hayes was initiated by a member or investigator of the Wright Patman Committee (App. 7th 264-265);

8) Cornue's primary concern was with the criminal sanctions of the Internal Revenue Code (App. 7th 268-271);

9) He prepared "sensitive case reports" concerning his investigation (App. 7th 293-294), but refused to answer why the ABC matter was a "sensitive" case (App. 7th, 294);

10) Cornue's supervisor, Ralph Weber, had a conversation with a person connected with the Wright Patman Committee concerning this investigation (App. 7th 299-300), but refused to answer whether he knew if anyone else from Internal Revenue discussed the ABC investigation with a representative of the Wsight Patman Committee (App. 7th 300-302);

11) Cornue said he had been directed to obtain the names of the members of ABC, but refused to say who gave him such instructions (App. 7th 321); and

12) He was present at a meeting in Washington D.C. wherein the ABC and Hayes cases were discussed with William Parker and Phillip Littman, Intelligence Division, National Office; Sheldon Cohen, Commissioner Internal Revenue, James Green, Assistant Commissioner; Donald Bacon, Deputy Commissioner of Compliance and his assistant Leon Green; Lester Uretz, Chief Counsel IRS; the Director of the Audit Division; Robert Lund, Assistant Director, Intelligence Division; the Director of the Administrative Division; Donald Bloom, Audit Division, National Office and Stanley Surrey, Assistant Secretary of the Treasury and three of his assistants (App. 7th 306-308), refused to testify wherther there was a writing that related to said meeting (App. 7th 308-309), refused to answer as to the time the meeting took place (App. 7th 309) and further refused to testify as to the conversation which took place at said meeting (App. 7th 310).

Cornue's deposition demonstrates the unfairness of the Government and certainly reflects on the good faith of the alleged need for ABC's books and records.

Cornue's testimony regarding the meeting between himself, the Internal Revenue and Treasury Department hierarchy substantiated the possibility of the impropriety of the investigation. At this point, the need for further discovery became critical to enable Hayes to realistically support his affirmative defenses. If further discovery revealed that the Internal Revenue summons was being used to obtain information for the "Wright Patman Committee," or for any other Federal or local government agencies or for the purpose of harassment or for any improper purpose, the petition for enforcement should have been denied. *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964); *Abel* v. *United States*, 362 U.S. 217, 226 (1960).

Because Hayes was denied any further discovery, he was precluded from meeting the burden set down in the *Powell* case, *supra*. It is respectfully submitted that this denial of further discovery was a denial of the process of law.

This Court in *Ungar* v. *Sarafite*, 376 U.S. 589, (1964) said at page 589-590:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery* v. *Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L. Ed. 377. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality, *Chandler* v. *Fretag*, 348 U.S. 3, 75 S.Ct. 1, 99 L.

> Ed. 4. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva* v. *United States*, 352 U.S. 385, 77 S.Ct. 431, 1 L. Ed. 2d 415; *Torres* v. *United States*, 270 F. 2d 252. (C.A. 9th Cir.); cf. *United States* v. *Arlen*, 252 F. 2d 491 (C.A. 2d Cir.)."

The trial court made this hearing the kind of "blind man's buff" which this Court condemned in *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958). Therefore, the continuance should have been granted to insure "proper litigation." *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947).

The Court of Appeals for the Seventh Circuit held that Hayes made no "formal" request for a continuance for the purpose of further discovery. However, the request was clearly made at the hearing as follows:

> "Now, your Honor, we feel that in order for us properly to represent our client in this matter, and properly to proceed to a hearing in this matter, it will be necessary for us to depose at least the Commissioner of Internal Revenue, and certainly a number of other people who were at that meeting." (App. 7th 160)
>
> * * * * *
>
> "Now, your Honor, I feel that we cannot properly proceed to hearing under these circumstances. We couldn't properly represent our client. Accordingly, we ask that we have some time, a considerable time, if the Court please, to proceed with our discovery in this matter." (App. 7th 161)
>
> * * * * * *
>
> "If I may add, your Honor, not only are we interested in taking several more depositions, we are very interested in filing a motion to produce.

"The Government yesterday, pursuant to a notice on the deposition, notice of deposition, produced a few documents, a very few documents. There are many more documents that we think are capable of discovery. We want to file a motion to produce—a motion to produce the documents . . ." (App. 7th 161)

* * * * *

"We would also like the court to decide whether or not the agent has substantial justification for refusing to answer the questions and, of course, you also have the Government's motion as regards our client's refusal to answer certain questions. I don't think the matter is in a posture where it could go to hearing." (App. 7th 162)

* * * * *

"Your Honor, we honestly could not—we could not proceed to hearing today. We couldn't be prepared. It's manifestly impossible. The depositions ended at 4:00 o'clock yesterday afternoon, if it was that early, and vistas were opened, your Honor, that just make it impossible for us properly to defend ourselves." (App. 7th 164)

* * * * *

"For the record, I would like to state, your Honor, that on behalf of our client Robert D. Hayes, as a Trustee of ABC, and Robert D. Hayes, individually, we feel that we are being denied an opportunity to properly prepare a defense to this matter under the Federal Rules of Civil Procedure. We feel that we are being denied discovery available under these rules, such as the production of documents, the ordering of the agent to answer certain questions that were asked on deposition yesterday, and in that regard we ordered an expedited transcript, your Honor, which has not been delivered yet. And we just feel that we cannot possibly go forward without the proper discovery so we can properly prepare our case. However, we will submit to the court's order. * * *" (App. 7th 165)

Rule 7(b)(1), Fed. Rules Civ. Proc. (App. C) requires that an application to the Court for an order be in writing, "unless made during a hearing or trial. . ." In *Douglas* v. *Union Carbide,* 311 F. 2d 182, 185 (4th Cir., 1962) the court held that an oral motion for a new trial made immediately upon the return of a jury verdict was made during the trial or hearing. Petitioner's oral motion for a continuance for the purpose of further discovery was not required to be any more "formal" than it was and complied with Rule 7(b)(1).

2. The Trial Court struck Petitioner's affirmative defenses for his refusal to answer questions at his deposition without first ordering him to answer and thereby failed to follow the Federal Rules of Civil Procedure.

The Government took the deposition of Hayes on March 14, 1968. Mr. Hayes gave his name, address, marital status, and testified that he was a trustee of ABC (App. 7th 331). Hayes declined to answer the rest of the questions invoked several constitutional provisions, including his privilege against self incrimination guaranteed him by the Fifth Amendment (App. 7th 331-353).

The following day the Government filed a motion to strike Hayes' affirmative defenses based on his refusal to answer questions during the course of the deposition. The Government's motion requested that ". . . on the trial of this cause said Respondent Robert D. Hayes be ordered to answer the questions which he refused to answer at his deposition, and upon his failure to do so, that the Court strike the affirmative defenses of said respondent."

At the hearing counsel for the Government asked the court to reserve its ruling on said motion until after the court had an opportunity to seek an order on Mr. Hayes to answer the questions.

The Government called Hayes as an adverse witness at the hearing. Hayes again answered the questions as to his name, home address, business address, and said that he had been a trustee of ABC since July 1966, but declined to answer any further questions, relying on his privilege against self-incrimination.

After questioning Hayes at length, the Government asked the court to sustain the motion to strike and the court reserved ruling. Not once during the course of questioning did Government counsel request the court to compel Hayes to answer a single question. No such request made subsequent to the hearing. The court never entered an order directing Hayes to answer any questions asked during the course of his deposition or hearing. Thus, Hayes never refused to obey a court order and was never held in contempt by the court, yet March 21, 1968, the District Court struck all his affirmative defenses.

There is no question but that the Federal Rules of Civil Procedure apply to the enforcement of an Internal Revenue summons. *United States* v. *Powell* 379 U.S. 48, 58 (Footnote 18) 1964, yet the Government argued, on appeal, that they were not applicable.

Rule 37, Fed. Rules Civ. Proc. 28 U.S.C.A., governs refusals to make discovery and the consequences thereof. That rule provides in relevant part:

> "(a) If a party or other deponent refuses to answer any questions propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter . . . he may apply to the court in the district where the deposition is taken for an order compelling an answer. . ."
>
> "(b) (2) If any party . . . refuses to obey an order made under subdivision (a) of this rule requiring him

to answer designated questions . . . the court may make such orders in regard to the refusal as are just, and among other the following:

"(iii) An order striking out pleadings or parts thereof. . ." Rule 37, Fed. Rules Civ. Proc. 38 U.S.C.A.

Rule 37 authorizing orders striking pleadings for refusal to answer questions, is in accord with *Hovey* v. *Elliott*, 167 U.S. 409 (1897). In the *Hovey* case, the lower court struck the defendant's answer as a punishment for contempt. Mr. Justice White, delivering the opinion of the court, and commenting on the lower court's order, said at pages 419 and 420:

"If the court had power to do this by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law?" If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard, on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other; the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards."

* * *

"Certain it is that in all the reported decisions of the chancery courts in England no single case can be found where a court of chancery ever ordered an an-

swer to be stricken from the files, and denied to a party defendant all right of hearing because of a supposed contempt." *Hovey* v. *Elliott,* 167 U.S. 409, 419, 420 (1897).

If no order was entered against Hayes to answer the Government's questions, the situation is far more extreme than the *Hovey* case, *supra,* since Hayes was never held in contempt of the court. Hayes respectfully submits that the trial court denied him due process of law when it failed to order him to answer after declining to answer questions based upon constitutional grounds. The District Court should have first entered an order compelling Hayes to testify before it could strike his affirmative defenses. *Independent Productions Corp.* v. *Loew's Inc.,* 283 F. 2d 730, 733 (2nd Cir. 1960). Amazingly, the Court of Appeals for the Seventh Circuit opinion stated, "We deem it immaterial whether the defenses were properly stricken under Rule 37 or otherwise . . ." (App. A) which contravenes this courts decision in *Hovey* v. *Elliott, supra.*

It is apparent that the trial court did not follow the procedures set forth in Rule 37 in granting the Government's motion to strike Hayes' affirmative defenses. It is Petitioner's contention that Hayes was denied due process of law by the trial court granting the motion to strike without first ordering him to answer as required by Rule 37.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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SAMUEL J. BETAR,
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Attorneys for Petitioner.

APPENDIX A.

IN THE

U. S. COURT OF APPEALS, 7TH CIRCUIT

SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

No. 16878 UNITED STATES OF AMERICA and ALAN D. CORNUE, Special Agent, *Petitioners-Appellees,* v. ROBERT D. HAYES, *et al.*, *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

FEBRUARY 19, 1969

Before SWYGERT, FAIRCHILD and KERNER, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* Proceeding to compel attendance, testimony, and production of records pursuant to summonses under the internal revenue laws.[1] Robert D. Hayes, one of the persons summoned, has appealed from an order requiring him to appear, testify, and produce records.

Messrs. Hayes, Stephenson, and Lauren are trustees of a trust operating under the name of "Americans Building Constitutionally (a trust) N. F. P.", sometimes referred to as ABC. Each was served with a summons in the mat-

[1] 26 U.S.C. secs. 7402(b) and 7604(a).

ter of the tax liability of ABC, requiring him to appear, give testimony, and produce all records of the trust for the period from July 15, 1966, the date of the trust instrument, to September 30, 1967.

The summonses were served October 5, 1967, and appearance required October 16. On February 1, 1968, Special Agent Cornue, who issued the summonses, petitioned for enforcement and the district court issued an order to show cause. Hayes' answer put in issue petitioner's averments that compliance with the summons is essential to the determination of ABC's tax liabilities and set forth as affirmative defenses: (1) that ABC is a not for profit trust for educational purposes and exempt, (2) that the government and Cornue have violated the rights of Hayes, ABC, and its members under Article I, Section 1 of the constitution and the first, fourth, fifth, sixth, eighth, ninth, tenth, and fourteenth amendments, (3) that they have "embarked on a course of action calculated to harass and embarrass" Hayes, ABC, and its members, refering to certain testimony before a subconimittee of the House of Representatives and various newspaper clippings.

The hearing took place March 15, 1968. The district court thereafter made written findings that special agent Cornue was assigned to investigate the tax liabilities of ABC; that he determined it was necessary to examine its books and records in order to determine whether it was a taxable entity and, if so, the extent of its tax liabilities; that such examination is necessary; that on August 23, 1967, Cornue requested Hayes and Stephenson to supply relevant information, but it was not supplied; that on September 12 at the suggestion of Hayes and Stephenson and their attorneys, Cornue presented written questions, but these were never answered; that on September 28, Cor-

nue requested Hayes to provide relevant information, but was again refused; that on October 13, after service of the summonses, trustees Lauren and Stephenson adopted a resolution directing that the books and records be put in the possession of Lauren and delivered to I.R.S.; that the three trustees later appeared before Cornue but failed to testify or produce records; that on October 20 and 24, Stephenson turned over some, but only a part of the requested records; that on November 3 Stephenson and Lauren delivered the ABC records to Hayes.

The court concluded that the three trustees have a duty to comply with the summonses and entered an order accordingly. Hayes has appealed.

The testimony at the hearings appears to support the findings. Hayes, indeed does not suggest that the findings were clearly erroneous. He does argue two other propositions, which we consider as follows:

Striking Hayes' affirmative defenses.

The trustees took Cornue's deposition and the government took Hayes' deposition on March 14, the day before the hearing.

Except for identifying himself as a trustee of ABC, Hayes responded to virtually every question as follows:

> "I respectfully decline to answer on the grounds that any answer would be an invasion of the right of privacy guaranteed under the Constitution of the United States, would violate my rights guaranteed under the First, Fourth, Fifth and Tenth Amendments to the Constitution of the United States, and on the further grounds that any answer would entail a violation of my fiduciary relationship as trustee and would violate the trust agreement."

He made the same response when asked about each of his three affirmative defenses.

At the hearing before the court Hayes declined to answer questions in the same areas on the grounds that his answer might tend to incriminate him.

Before the hearing on March 15, the government filed a written motion that Hayes be ordered to answer and that upon his failure his affirmative defenses be stricken. After the refusals to testify at the hearing, the government orally asked that its motion to strike be granted. Ruling was reserved and the hearing was completed. An order striking the defenses was entered March 21.

Hayes contends that the striking of his defenses was not authorized by Rule 37(b)(2)(iii) F. R. Civ. P., under which the government's written motion in advance of the hearing was presumably made, because the court never directed him to answer, a step which is prescribed by the rule.

The defenses were not stricken, however, until after the close of the hearing. Hayes was not prevented from presenting evidence to support them. If they were viable, he had the burden of proof[2] and utterly failed to carry it. We deem it immaterial whether the defenses were properly stricken under Rule 37 or otherwise or were simply left unproved.

We note also, but find it unnecessary to decide, that there is or may be merit to the government's additional arguments that the defenses stated were insufficient as a matter of law and that Hayes may be thought to have prevented the court from ordering him to answer by basing his refusal to answer at trial upon possible self incrimination.

Alleged need for more extensive discovery.

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[2] *United States* v. *Powell* (1964), 379 U.S. 48, 58.

Hayes' position appears to be that if he had been allowed more time before hearing, in which to take the depositions of Cornue's superiors, compel Cornue to answer questions government counsel had instructed him not to answer on his March 14 deposition, and seek production of documents by the government, he might have been able to obtain proof to support the claim of harassment in his third affirmative defense, or proof to support additional defenses, such as that the I.R.S. was improperly seeking to obtain evidence for use in a criminal prosecution or was improperly seeking to obtain information for a congressional subcommittee.

Hayes' counsel made no formal motion to compel Cornue to answer any particular question, nor for a continuance. He did tell the court at the beginning of the hearing that Cornue had declined to answer various questions, that Hayes was not ready to proceed, but needed considerable time for additional depositions and production of documents. The court decided to proceed at once.

Hayes concedes in his brief that he "is seeking this Court's aid on a matter of discretion with the trial court." And we can not find that the district court abused its discretion by proceeding in the face of counsel's informal request for more time, just referred to. Moreover, Hayes, who had, on the grounds of privacy and fiduciary duty, declined to testify in support of the defenses stated in his own answer, lacking persuasiveness in asserting a right to broader discovery than the government had afforded him. And the shell game the trustees have seemed to play with the ABC records suggests a desire to obstruct inquiry rather than a good faith defense.

We are mindful, however, that the depositions were taken only the day before the hearing and had not been tran-

scribed, and that although by nature this type of proceeding should be expeditious, the person summoned is entitled to a meaningful adversary hearing of legitimate challenges to a summons. We have therefore examined the depositions as well as the transcript of hearing and other papers in the record to see whether they suggest the probable existence of appropriate challenges which Hayes should have been given a greater opportunity to pursue.

He supported his third affirmative defense (of harassment) by appending partial transcript of a House subcommittee hearing, dealing with foundations, held November 15, 1967. Since that hearing took place more than a month after the summonses were issued it is clear that the hearing did not influence their issuance, and could be relevant only by reflecting events which had occurred previously. Cornue testified he understood there had been contacts with reference to ABC between a subcommittee staff member and a Cornue's superiors, and testified that he had attended a meeting concerning the matter with top level I.R.S. personnel.

It seems fair to summarize that both the subcommittee and the I.R.S. had a lively concern about entities who are or claim to be tax exempt foundations, and about ABC; that the Honorable Wright Patman, chairman of the subcommittee, was highly critical of the Treasury and I.R.S. concerning what he considered inaction or insufficient action about abuses of tax exempt status by foundations, and that the subcommittee had sought information from I.R.S. about ABC and its operations. There is nothing to indicate that the information I.R.S. is seeking by the use of summonses is not relevant to determination of ABC's tax liability.

On the other hand the facts of record strongly indicate that an inquiry into the existence and extent of ABC's tax liability is legitimate and an examination of the records sought is necessary for such determination.

Hayes has claimed that ABC is a not for profit trust, organized and operated for educational purposes, and exempt from federal taxation. The declaration of trust, however, authorizes the trustees to carry on almost any kind of business, to make distributions of the proceeds and income in their discretion, and to distribute the assets to beneficiaries upon final liquidation. Except for the initials N. F. P. in the name, there is nothing in the entire instrument prohibiting operation for profit, nor is there any provision expressly requiring or even authorizing educational activity. The trust has not applied for recognition of its exempt status.

A memorandum produced by Cornue indicates he has been informed that "ABC . . . is promoting and assisting throughout the United States the establishment of not-for-profit corporations and personal trusts for individuals for fees ranging from $1,000 to $15,000, the purpose of which is the non-payment of federal income and inheritance taxes."

At best for Hayes, the record suggests no more than that I.R.S. is making a proper inquiry into ABC's tax liability; that the subcommittee has urged I.R.S. to press the matter vigorously and make its findings known to the subcommittee; that because of the congressional interest and criticism, top level personnel of I.R.S. have been in close touch with the investigating agent and have perhaps supervised him unusually closely. Even if Hayes has proved all that, he would not have established that the

The order appealed from is affirmed.

KERNER, *Circuit Judge,* concurring. I concur in the opinion of my brethren. However, I do not think it is our function to speculate from the record as to what facts further discovery would have disclosed. In order to make Hayes' defenses meaningful, I feel that he was entitled to further discovery of Agent Cornue and the I.R.S. See *United States* v. *Benford,* .... F. 2d .... (No. 16771, 7th Cir. Feb. 11., 1969); *United States* v. *Moriarty,* 278 F. Supp. 187 (E. D. Wis. 1967); and *Kennedy* v. *Rubin,* 254 F. Supp. 190 (N.D. Ill. 1966). On this issue I would limit our holding to saying that the trial judge did not abuse his discretion solely on the ground that Hayes' counsel, while moving for an extension of time, never properly moved for or requested further discovery.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

investigation was being conducted or the summons issued for an improper purpose.

It was also developed that Cornue is a special agent of the intelligence division of I.R.S.; that the intelligence division investigates suspected criminal violations of income tax and other revenue laws and recommends prosecution when warranted; that the investigations of ABC and of Hayes individually are so-called joint investigations, in which a revenue agent works with and at the direction of the intelligence agent; that the objects of the joint investigation are to determine tax liability and whether there has been a criminal violation of the internal revenue code.

The fact that an investigation for the purpose of determining tax liability is deemed likely to produce evidence warranting criminal prosecution does not make the use of summons an improper use.[3]

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[3] *Wild* v. *United States* (9th Cir. 1966), 362 F. 2d 206, 209; *Boren* v. *Trecker* (9th Cir. 1961), 289 F. 2d 767, 772.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

WEDNESDAY, FEBRUARY 19, 1969

Before SWYGERT, FAIRCHILD and KERNER, *Circuit Judges.*

UNITED STATES OF AMERICA and ALAN D. CORNUE, Special Agent *Petitioners-Appellees,* vs. No. 16878 ROBERT D. HAYES, *et al.,* *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

MONDAY, APRIL 7, 1969

Before SWYGERT, FAIRCHILD and KERNER, *Circuit Judges.*

UNITED STATES OF AMERICA and ALAN D. CORNUE, Special Agent *Petitioners-Appellees,* vs. No. 16878 ROBERT D. HAYES, *et al.,* *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

KERNER, *Circuit Judge,* dissenting on rehearing: "Upon reexamination of the record, I am now of the opinion that the request for the production of documents was properly made. I therefore now dissent from the majority on the basis stated in my earlier concurring opinion."

IN THE UNITED STATES DISTRICT COURT

* * (Caption—68 C 189) * *

ORDER

This cause having come on to be heard before the undersigned on March 15, 1968 and the parties having been heard, evidence presented, argument had, and due consideration being given, and the Court having issued Findings of Fact and Conclusions of Law.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the respondents, Robert D. Hayes, Richard J. Stephenson and J. Alton Lauren, and each of them, appear before the petitioner, Special Agent Alan D. Cornue, or any other proper officer of the Internal Revenue Service designated by him, at 10:00 A.M. on March 28, 1968 at the office of the United States Attorney, United States Courthouse, Room 1500, 219 South Dearborn Street, Chicago, Illinois, then and there to comply with the Internal Revenue summonses served upon them on October 5, 1957; and it is further

ORDERED, ADJUDGED and DECREED that the respondent Robert D. Hayes appear at the aforementioned date, time and place and then and there further comply with the summons served upon him on October 5, 1967 by producing for examination and copying all books, records, papers and documents of American Building Constitutionally as set forth in the summons served upon him; and it is further

ORDERED, ADJUDGED and DECREED that the petitioner, the United States of America, recover its costs herein to be taxed by the Clerk.

ENTER:

Alexander J. Napoli
United States District Judge.

Dated at Chicago, Illinois,
in said District and Division
this 21st day of March, 1968

IN THE UNITED STATES DISTRICT COURT

* * (Caption—68 C 189) * *

ORDER

This cause coming on to be heard on the Motion of Petitioners to strike the affirmative defenses of Respondent Robert D. Hayes, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the affirmative defenses of Respondent Robert D. Hayes be and the same are each and altogether hereby stricken.

ENTER:

Alexander J. Napoli
United States District Judge.

Dated at Chicago, Illinois,
in said District and Division
this 21st day of March, 1968.

APPENDIX C

Amendment V, to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 7 (b) (1) Federal Rules of Civil Procedure provides:

> "**(b) Motions and Other Papers.**
>
> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

Rule 26(a) and (b) Federal Rules of Civil Procedure provides:

> **(a) When Depositions May Be Taken.** Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave,

granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules, except that in admiralty and maritime claims within the meaning of Rule 9(h) depositions may also be taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U.S.C. § 1781). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to.

Rule 37(b) (2) Federal Rules of Civil Procedure, 28 U.S.C., provides:

"(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other

property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

* * *

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.